

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KATHY A. FRYE,

Defendant-Appellant.

UNPUBLISHED

June 17, 1997

No. 188879

Wayne Circuit Court

LC No. 94-006752

Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from her bench trial convictions of embezzlement by an agent, servant, employee, trustee, bailee or custodian, MCL 750.174; MSA 28.371. Defendant was sentenced to three to five years in prison. We affirm.

Defendant's felony information sets forth 163 counts, each containing alternative charges of larceny over \$100, MCL 750.356; MSA 28.588, or larceny by trick over \$100, MCL 750.356; MSA 28.588; or larceny by conversion over \$100, MCL 750.362; MSA 28.594, or embezzlement by an agent, servant, employee, trustee, bailee or custodian, MCL 750.174; MSA 28.371. At the time of trial, the prosecutor voluntarily dismissed all but forty of the alternative charges. Defendant first argues that in rendering its findings of fact and conclusions of law, the trial court failed to distinguish which of these crimes it found that defendant had committed and instead issued a general verdict, convicting defendant of each of the alternative crimes charged. Defendant further argues that the verdict was void for lack of specificity and that this defect could not be cured at sentencing. We disagree.

We first observe that if confusion did exist regarding the trial court's verdict, the trial court clarified this matter at the time of sentencing by entering judgment on the charge of embezzlement by an agent, servant, employee, trustee, bailee or custodian only. Moreover, both defendant's order of conviction and sentence and judgment of sentence state that defendant was found guilty of embezzlement by an agent, servant, employee, trustee, bailee or custodian only. Courts speak through their written orders and not oral statements, *People v Turner*, 181 Mich App 680, 683; 449 NW2d 680 (1989). Because the trial court's written orders list only embezzlement by an agent, servant,

employee, trustee, bailee or custodian as the crime for which defendant had been convicted, we find no error.

Defendant next argues that the evidence presented at trial was insufficient to support her conviction because the prosecutor failed to prove that Helene Pack was incompetent on the dates that the joint bank accounts were opened. We disagree.

In determining whether evidence presented at trial was sufficient to sustain a conviction, we review the evidence presented in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); *People v Catanzarite*, 211 Mich App 573, 577; 536 NW2d 570 (1995).

The elements of the crime of embezzlement by an agent, servant, employee, trustee, bailee or custodian are: (1) the money or personal property in question must belong to the principal; (2) the defendant must have had a relationship of trust with the principal because he was an agent, servant, employee, trustee, bailee or custodian of the principal; (3) the money or personal property in question must have come into the defendant's possession or under his charge or control because of that relationship of trust with the principal; (4) the money or personal property must have been dishonestly disposed of or converted to the defendant's own use, or taken or secreted with intent to convert to his own use without the consent of his principal; (5) this act must have been done without the consent of the principal; and, (6) at the time of the conversion or appropriation to his own use, the defendant must have intended to defraud or cheat the principal of some property. *People v Wood*, 182 Mich App 50, 53-54; 451 NW2d 563 (1990). Intent may be inferred from the attendant facts and circumstances. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995).

There exist two distinct types of embezzlement. *Wood, supra* at 53-54. The first occurs when an individual fraudulently disposes of or converts to his own use money or personal property of his principal. *Id.* The second occurs when an individual conceals with intent to convert to his own use money or personal property without the consent of his principal. Lack of consent is an element only in this latter category and thus is not always required to sustain a charge of embezzlement. *Id.* Here, defendant did not conceal the money with the intent to convert it to her later use; rather, the evidence presented at trial showed that her misappropriation of the money was based on defendant's attainment of joint ownership of the money at issue and the subsequent withdrawal of that money from the jointly-held accounts. Therefore, lack of consent need not be established to sustain the charge of embezzlement made against defendant. *Id.*

Viewing the evidence presented in a light most favorable to the prosecution: (1) the money which was withdrawn by defendant originated in accounts owned by Richard and Helene Pack; (2) defendant served as caregiver to Helene Pack and thereby enjoyed a relationship of trust with her; (3) the money misappropriated by defendant came into defendant's possession only after Helene Pack changed over funds long held jointly with Richard Pack into funds held jointly with defendant and that change of joint ownership from Richard Pack to defendant occurred only after defendant entered into a relationship of trust with Helene Pack; (4) the money was converted to defendant's own use by virtue of

defendant's numerous withdrawals from the joint accounts; and, (5) defendant's intent to defraud may be inferred from her having attained joint ownership of Richard and Helene Pack's life savings and then having withdrawn a vast majority of those savings from the joint accounts. *Wood, supra* at 53-54. Therefore, sufficient evidence was presented at trial to sustain defendant's conviction.

Defendant next argues that the sentencing court erred by failing to consider statutorily mandated factors in ordering that she pay restitution. We disagree.

Defendant argues that the sentencing court erred in ordering restitution of \$380,000 because the evidence failed to show that the Packs suffered losses in that amount. A sentencing court may order a defendant to pay restitution in addition to any other penalty authorized by law. MCL 769.1a(2); MSA 28.1073(2); MCL 780.766(2); MSA 28.1287(766)(2). Such restitution may exceed the losses caused by the actual crime of which the defendant is actually convicted. *People v Letts*, 207 Mich App 479, 480-481; 525 NW2d 171 (1994). A court may order the probation department to obtain information pertaining to the amount of the loss suffered by any victim as a result of an offense, which information shall be included in the Presentence Investigation Report ("PSIR") or in a separate report. MCL 780.767; MSA 28.1287(767). The amount of a restitution award may be adequately supported by a PSIR. *People v Hart*, 211 Mich App 703, 706; 536 NW2d 605 (1995). Here, in ordering restitution, the sentencing court relied upon statements made in the PSIR. Therefore, the trial court did not err in setting the amount of restitution.

Defendant further argues that the trial court erred by failing to consider her ability to pay in ordering restitution. Where the defendant fails to request an evidentiary hearing to determine his ability to pay restitution, we are unable to conduct a meaningful review of the issue. Accordingly, having failed to raise this issue below, defendant has not properly brought it before this Court. *People v Griffis*, 218 Mich App 95, 103; 553 NW2d 642 (1996).

Defendant further argues with regard to the restitution issue that the trial court failed to consider the needs of her dependent children in ordering restitution. At sentencing, the court noted that it had reviewed the PSIR. The PSIR twice makes note of defendant's children. Therefore, we find that the trial court considered defendant's dependents in ordering restitution.

Defendant next argues that the trial court erred in scoring Offense Variable ("OV") 8 as part of setting the sentencing guidelines. A party may not raise an appeal a challenge to a guidelines calculation unless he raised it at sentencing, or by a motion for resentencing, or the calculation was based on a counsellless juvenile conviction or upon a timely motion to remand filed with this Court. MCR 6.429(C); *People v Alexander (After Remand)* 207 Mich App 227, 229-230; 523 NW2d 653 (1994). Defendant objected at sentencing to the scoring of OV 8 on the grounds that OV 8 is intended to apply to crimes other than that for which defendant is sentenced. However, below, defendant objected to OV 8 on the ground that it applies to drug-type offenses only and not to the crimes for which defendant was convicted. Therefore, defendant raised a new challenge to OV 8 on appeal which was not raised below. This issue being unpreserved for our review, we decline to address it. *Id.* In any case, there was evidence to support the trial court's scoring of this variable.

Lastly, defendant argues that the trial court erred by departing from the minimum term of imprisonment recommended by the sentencing guidelines. Again, we disagree.

Defendant's sentence guideline range was calculated at one to two years. The actual minimum sentence imposed was three years.

We review the sentence imposed by a trial court for an abuse of discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). A trial court abuses its discretion in rendering sentence when it violates the principal of proportionality. A sentence must be proportionate to the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Departures from the sentencing guidelines are permitted, but are suspect and subject to careful scrutiny on appeal. *Milbourn, supra* at 656-657. The sentencing court may deviate from the guidelines range when the range is disproportionate to the seriousness of the crime and the defendant's prior record. *Id.* at 636, 657. A deviation from the guidelines range may be based on factors already considered in the guidelines calculations but such a deviation must be made only with caution. *Id.* at 660 n 27. The relationship between the defendant and the victim is an important factor not included in the guidelines calculations. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995).

In fashioning an appropriate sentence, the court may consider: (1) the severity of the crime, *People v Hunter*, 176 Mich App 319, 321; 439 NW2d 334 (1989), (2) the nature of the crime of which defendant has been convicted, *id.*, (3) the defendant's social and personal history, *id.*, (4) the defendant's attitude toward his criminal behavior, *id.*, (5) the effect of the defendant's crime upon the victim, *People v Girardin*, 165 Mich App 264, 266; 418 NW2d 453 (1987), and (6) the defendant's lack of remorse, *Houston, supra* at 323.

The relationship existing between defendant and Helene Pack was one of trust and because defendant made use of this trust to perpetrate her crimes, that relationship was an aggravating factor to be considered in addition to the sentencing guidelines calculation. *Houston, supra* at 323. Defendant argues that this relationship of trust is an essential element of the crime of embezzlement by an agent, servant, employee, trustee, bailee or custodian and is therefore considered by the sentencing guidelines. However, as noted above, a deviation from the guidelines range may be based on factors already considered in the guidelines calculations. *Milbourn, supra* at 660 n 27. Moreover, upon consideration of the nature of the crime of embezzlement by an agent, servant, employee, trustee, bailee or custodian in general, as well as the specific acts which lead to defendant's conviction, including the methodical and repetitive depletion of the life savings of an elderly man and his mentally ill wife, the devastating financial effect of defendant's crime upon both Richard and Helene Pack, and defendant's lack of remorse, the trial court did not abuse its discretion in rendering defendant's sentence. *Milbourn, supra* at 635-636.

Affirmed

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Kathleen Jansen.